IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

JEFFREY GEHRKE and KATHY FINK, husband and wife,	)	2 CA-CV 2006-0063
	)	DEPARTMENT B
Plaintiffs/Counterdefendants/ Appellees/Cross-Appellants,	)	MEMORANDUM DECISION
	)	Not for Publication
v.	)	Rule 28, Rules of Civil
	)	Appellate Procedure
JOHN DILLON and MAXINE DILLON, husband and wife,	)	
	)	
Defendants/Counterclaimants/ Appellants/Cross-Appellees.	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20042520

Honorable Leslie Miller, Judge

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Howard A. Kashman
Tucson
Attorney for Plaintiffs/
Counterdefendants/Appellees/
Cross-Appellants

Munger Chadwick, P.L.C.
By Mark E. Chadwick
Tucson
Attorneys for Defendants/
Counterclaimants/Appellants/
Cross-Appellees

B R A M M E R, Judge.

¶1 Appellants/cross-appellees John and Maxine Dillon ("Dillon") agreed to purchase an auto repair business and a residence from appellees/cross-appellants Jeffrey Gehrke and Kathy Fink ("Gehrke"). The transaction did not close, litigation ensued, and a jury awarded Dillon net monetary damages totalling $43,220. Dillon appeals from the trial court's grant of some of Gehrke's motions for judgment as a matter of law, which denied Dillon specific performance, punitive damages, and recovery on the claim for intentional interference with contract. Gehrke appeals from the court's denial of his motion for judgment as a matter of law on Dillon's claim for breach of contract and contends the court erred in awarding Dillon attorney fees.

Factual and Procedural Background

¶2 "We view the facts and all inferences in the light most favorable to sustaining the jury verdict and resulting judgment." *Hyatt Regency Phoenix Hotel Co. v. Winston & Strawn*, 184 Ariz. 120, 123, 907 P.2d 506, 509 (App. 1995). However, the following statement of facts summarizes the key undisputed facts and highlights the disputed issues in an attempt to make a factually complex case understandable.

¶3 In October 2003, Jeffrey Gehrke placed an advertisement in a newspaper to either sell his Tucson automobile repair business, the Car Doctor, or find a business partner. John Dillon responded, and spent the month of November in the Car Doctor premises observing the business and helping out. During a meeting in Dillon's home in December, he made Gehrke an offer to buy the business. Soon after, Gehrke placed a second

advertisement in the newspaper, seeking someone to buy either the business or the land on which it was located.

¶4 The parties later renewed negotiations, and on January 2, 2004, entered into a written agreement for Dillon to buy the land and the business assets of Car Doctor. The contract stated that Dillon would purchase the business for $500 in earnest money and the assumption and payment of an existing $194,000 debt secured by a mortgage on the property. The parties do not dispute that there was also a "side deal" in which Dillon would pay Gehrke additional compensation for the property,[1] although each party claims the side deal was the other party's idea. The written contract stated possession of the property would be delivered to Dillon upon execution of the agreement, closing of the transaction would "occur on or before February 28th, 2004," or another date agreed to in writing by both parties, and "[t]ime is of the essence in this agreement." On the same day, Dillon also agreed to purchase a residence from Gehrke on Waverly Street in Tucson for $10,000 in cash, a vehicle, and Dillon's assuming and paying the debt owed on the property. The written contracts for both sales state each transaction was contingent on completing the other.

¶5 Gehrke admits he did not tell Dillon he only had rights to the name "Car Doctor of Tucson" and that the "Car Doctor" name he owned carried that geographic restriction.[2]

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[1]Gehrke claims the side deal was for $30,000 in cash, a 2000 Camaro automobile, and two slot machines. Dillon does not dispute this on appeal but at trial contended the deal was for $25,000 in cash in addition to the car and slot machines.

[2]After naming his business the Car Doctor, Gehrke was approached by a man who had "owned the Car Doctor franchise name for quite a few years." Gehrke then changed the

Gehrke testified he did tell Dillon, before the contracts were signed, about a boundary dispute involving a narrow strip of land adjacent to, but not included in, the Car Doctor property described in the January 2 contract. The strip of land lies inside the fences that ostensibly define the Car Doctor property. Dillon testified Gehrke had not told him about the dispute and had represented that "the whole fenced area belonged to him."

¶6 After Dillon began operating the business, he had numerous conflicts with a neighbor who claimed to own the disputed land. Dillon admitted he was "not willing to go to closing to buy [the Car Doctor] property that was in the agreement" because of the dispute. Dillon had given Gehrke the Camaro and a check for $2,000 soon after the contracts were signed and had made some payments on the business property debt.

¶7 Dillon told Gehrke about the doctrine of adverse possession which could allow the parties to obtain the disputed property.[3] They continued negotiations after the February 28, 2004, closing date stated in the contracts, although the parties dispute whether the closing date was formally extended. Dillon proposed an addendum to the contract in March, which would have extended the closing date, provided an option for Dillon to lease or purchase the business property, and given Dillon Gehrke's power of attorney to resolve the property dispute. The addendum was never signed by both parties. The parties dispute whether the addendum and other negotiations constituted a new agreement or were merely

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name of the business, but later negotiated an arrangement in which Gehrke paid $5,000 for the rights to the name Car Doctor of Tucson.

[3]Gehrke successfully gained title to the disputed portion of land in October 2005, approximately one month before the trial of this matter.

an attempt to modify the extant contracts. During the week of April 19 to 23, Dillon moved much of the Car Doctor's business equipment to an auto salvage yard to be stored, allegedly to allow repairs such as laying new asphalt at the facility, and he testified Gehrke might have been present when some of the property was removed. Dillon also removed a computer from the property on April 25, allegedly to tally the accounts receivable.[4]

¶8 On Friday, April 23, 2004, Fink met with Dillon in his home to discuss a proposal from Gehrke. Fink secretly recorded the discussion. The parties discussed their claimed misunderstandings as to the intent of the original agreements and discussed the possibility of rescinding the contracts. Later that day, Dillon met with Car Doctor employees and told them that he either was giving the business back to Gehrke or was considering doing so. Manuel Lugo, who had been a Car Doctor employee for both Gehrke and Dillon, called Gehrke that day and told him of the employee meeting with Dillon and said Dillon had taken a lot of equipment out of the shop.

¶9 On Monday, April 26, Dillon arrived at the shop to find the locks changed and Gehrke present. A sign on the business's door stated it was closed due to a burglary. The police were summoned. Gehrke and Dillon had at least one conversation that day about the dispute. Gehrke told people that Dillon had stolen the equipment. Gehrke was unable to restart the Car Doctor business after he regained possession of the property. Dillon did not

[4]After repair work had been performed, Dillon had allowed customers of Car Doctor to make installment payments in an attempt to increase business.

return the equipment to Gehrke and rebuffed Gehrke's attempt to return the Camaro to him, which resulted in Gehrke's suing Dillon in May 2004.

¶10 Gehrke's complaint alleged Dillon had breached the business sale contract by "refusing to pay the purchase price into the escrow account prior to the agreed upon date of closing" and by failing "to pay all costs during his operation of the business." Gehrke also alleged Dillon unlawfully converted Car Doctor equipment with a market value "in excess of $30,000."[5] Dillon filed an answer and counterclaim in June, denying Gehrke's allegations and claiming that Gehrke had breached the contract by

> breaching warranties regarding the condition of the property and the physical dimensions of the property, failing to disclose environmental hazards . . . , failing to produce marketable title . . . , failing to convey all business assets free of liens, failing to pay Car Doctor debts incurred . . . before January 2, 2004, failing to disclose that he did not have a registered trade name known as "Car Doctor," wrongfully interfering with Dillon's business operations, and wrongfully converting receivables generated by Dillon.

Dillon also sought specific performance of both January 2 contracts. He further alleged fraud before and after the January 2 Car Doctor agreement, alleging Gehrke had "made multiple misrepresentations . . . regarding the condition of the property" and had "induc[ed] Dillon to continue to operate the Car Doctor and provide consideration to Gehrke." Finally, Dillon alleged negligent misrepresentation, defamation, interference with contract, and conversion of "approximately $60,000 in customer receivables."

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[5]Gehrke amended his complaint during trial to add a claim for unjust enrichment.

¶11 The jury found in favor of Gehrke on his claim for conversion, awarding him $5,000, but found in favor of Dillon on Gehrke's claims for breach of contract and unjust enrichment. The jury found in favor of Dillon on his claims for breach of contract, conversion, and defamation, awarding him $45,220, $2,500, and $500, respectively. The jury also found in favor of Dillon on his claims for fraud and negligent misrepresentation, but awarded him no damages. Finally, the jury found in favor of Gehrke on Dillon's claim for unjust enrichment. As previously stated, net damages in favor of Dillon totaled $43,220; Dillon was also awarded $54,000 in attorney fees and his costs.

Discussion

Breach of Contract

¶12 Gehrke asserts the trial court erred in denying his motion for judgment as a matter of law on Dillon's claim for breach of contract. A directed verdict "should be granted if the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense." *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990). We view the evidence "in the light most favorable to the party who opposed the motion." *Rocky Mountain Fire & Cas. Co. v. Biddulph Oldsmobile*, 131 Ariz. 289, 292, 640 P.2d 851, 854 (1982).

¶13 Dillon contends "[t]he jury could only have found that there was a breach of contract if it found that Mr. Gehrke and Mr. Dillon had agreed to modify both contracts so as to extend their closing dates." We agree; based on the jury's verdict that Gehrke breached

the contract, it must have believed that the parties had agreed to extend the closing of the January 2 contract. Gehrke, as was required, had immediately given Dillon possession of the Car Doctor property upon the signing of the contract. It is undisputed that Dillon did not perform by placing the money in escrow as required by the contract. On February 28, Gehrke was able to transfer title to the land described in the contract to Dillon, although not to the disputed property. This strip of land, of course, was not a part of the property described in the contract. And nothing in the contract required Gehrke to transfer the Car Doctor trade name to Dillon before closing, an event that never occurred. Accordingly, Gehrke fully performed his pre-closing obligations under the contract. Only if the jury found the closing date had been extended or a new contract formed could he be found liable for breach of contract.

¶14 We also agree with Dillon that parties can orally modify a written contract even though the contract prohibits oral modification. *See Phoenix Orthopaedic Surgeons, Ltd. v. Peairs*, 164 Ariz. 54, 57-58, 790 P.2d 752, 755-56 (App. 1989) ("'The general rule in most jurisdictions is that parties to a written contract may alter or modify its terms by a subsequent oral agreement even though the contract precludes oral modification.'"), *disapproved on other grounds by Valley Med. Specialists v. Farber*, 194 Ariz. 363, ¶ 32, 982 P.2d 1277, 1286 (1999), *quoting Park v. Dealers Transit, Inc.*, 596 F.2d 203, 204 (7th Cir. 1979). However, there was insufficient evidence for a reasonable jury to find so here. "A contract is 'a bargain in which there is a manifestation of mutual assent to the exchange and a consideration.'" *Johnson v. Earnhardt's Gilbert Dodge, Inc.*, 212 Ariz. 381, ¶ 10, 132 P.3d 825, 828 (2006),

quoting Restatement (Second) of Contracts § 17(1) (1981); *see also Canyon Contracting Co. v. Tohono O'Odham Hous. Auth.*, 172 Ariz. 389, 393, 837 P.2d 750, 754 (App. 1992) ("Assent to the terms of a contract is the central question in determining the existence of a contract.").

¶15 In his response to Gehrke's contention that there was no agreement to extend the closing dates of the two contracts, Dillon points to testimony by both parties at trial. Gehrke expressly testified there was no agreement to extend the closing dates of the contract. He said, "Dillon refused to do anything as far as closing on the contract until the issue of the land dispute was settled. That was at his insistence. I didn't agree with it, but he refused to consider it any other way." Asked whether he and Gehrke had "an understanding with reference to the February 28th closing date," Dillon testified, "[W]e couldn't meet that, so we came to some kind of terms on it. And verbally we were agreeing to these things as we were going along." Dillon further testified they were negotiating a written extension of the closing date. We cannot say this evidence was sufficient to permit a jury to find either that the closing had been extended to a date certain or that a new contract had been formed. There was no evidence of mutual assent, consideration, or any terms of a new contract. *See Johnson*, 212 Ariz. 381, ¶ 10, 132 P.3d at 828; *Canyon Contracting Co.*, 172 Ariz. at 393, 837 P.2d at 754.

¶16 Assuming, arguendo, a reasonable jury could have concluded the parties had entered into a new agreement as Dillon asserted at trial and to this court at oral argument, any such agreement would be too indefinite to be enforced. *See Pyeatte v. Pyeatte*, 135 Ariz.

346, 350, 661 P.2d 196, 200 (App. 1983) ("Although the terms and requirements of an enforceable contract need not be stated in minute detail, it is fundamental that, in order to be binding, an agreement must be definite and certain so that the liability of the parties may be exactly fixed."); *see also Rogus v. Lords*, 166 Ariz. 600, 602, 804 P.2d 133, 135 (App. 1991) ("For an enforceable contract to exist, there must be an offer, an acceptance, consideration, and sufficient specification of terms so that the obligations involved can be ascertained."). Dillon suggests that the closing date of the original contract had been extended for the foreseeable future to permit resolution of the property dispute. But, with this extension, there would be no way of determining if or when a breach occurred. *See AROK Constr. Co. v. Indian Constr. Servs.*, 174 Ariz. 291, 297, 848 P.2d 870, 876 (App. 1993) ("'The terms of a contract are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy.'"), *quoting* Restatement (Second) of Contracts § 33(2) (1981). And, although "'extrinsic evidence is always admissible to aid in interpretation and to establish the meaning that was intended by the parties,'" *id*. at 298, 848 P.2d at 877, *quoting* 1A Arthur L. Corbin, *Corbin on Contracts*, § 95, at 409 (1963), here, there is no evidence of a closing date for the new contract.

¶17 Nor did the parties have any agreement addressing the disputed property if and when its status were resolved. This is problematic because the January 2 written contract neither includes nor refers to the disputed strip of land. And the evidence establishes the parties were continuing to negotiate about issues unrelated to the written contract, such as whether Dillon could lease the property with an option to buy it. Thus, any purported

contract relating to the sale of the Car Doctor had no closing date and no adequate description of either its terms or the property to be sold. This is insufficient as a matter of law. "Terms necessary for the required definiteness frequently include time of performance, place of performance, price or compensation, penalty provisions, and other material requirements of the agreement." *Pyeatte*, 135 Ariz. at 350, 661 P.2d at 200; *see also Wing v. Munns*, 849 P.2d 924, 924 (Idaho 1993) ("Aside from the problem of the statute of frauds, an oral agreement which lacks an understanding of the amount and description of the property to be leased is too indefinite to be enforced.").

¶18 We therefore find the trial court erred in denying Gehrke's motion for judgment as a matter of law and reverse the jury's award of damages in favor of Dillon based on Gehrke's breach of contract. Moreover, as the attorney fees granted Dillon related solely to the breach of contract claim, we also vacate that award.

Specific Performance

¶19 Dillon contends the trial court erred in granting Gehrke's motion for judgment as a matter of law on Dillon's claim for specific performance of both the Car Doctor and Waverly contracts. "[W]e review *de novo* the trial court's grant of a directed verdict, examining the evidence in the light most favorable to the party against whom the verdict was entered." *Little v. All Phoenix S. Cmty. Mental Health Ctr., Inc.*, 186 Ariz. 97, 101, 919 P.2d 1368, 1372 (App. 1995). Viewing the evidence in the light most favorable to Dillon, he testified that he did not perform his duties under the contracts by February 28 because of the dispute over the Car Doctor's property description and that the Car Doctor contract was

extended. But Dillon, as stated above, failed to present sufficient evidence of a definite, enforceable agreement. He therefore cannot require specific performance of a nonexistent agreement. And, because there is no evidence that Gehrke breached the Waverly agreement or that Dillon attempted to perform his obligations under it, Dillon is also not entitled to specific performance of that contract. *See Daley v. Earven*, 131 Ariz. 182, 187, 639 P.2d 372, 377 (App. 1981) ("Specific performance is a remedy available for breach of contract."). Moreover, the Waverly contract was contingent on the Car Doctor contract, and we have already concluded no new contract for sale of the Car Doctor property was proved.

Interference with Contract

¶20 Dillon also argues the trial court erred in granting Gehrke's motion for a directed verdict on Dillon's claim that Fink intentionally interfered with a contract between Gehrke and Dillon. Again, we review de novo the trial court's grant of a directed verdict, viewing the evidence in the light most favorable to Dillon. *See Little*, 186 Ariz. at 101, 919 P.2d at 1372.

¶21 The trial court found that Fink did not interfere with any contract. Dillon's argument on appeal is based entirely on the premise "that the Car Doctor Contract and Waverly Contract were in existence in March/April 2004, when Ms. Fink became involved and alleged[ly] induced Mr. Gehrke to breach them."[6] The court found "[t]here was no existing contract[,] [t]here was [only] an effort to have a contract" at the time Fink became

[6]Dillon appears to have abandoned the argument he made in the trial court that Fink was "instrumental in [ensuring that] the January 2, 2004 contract never was closed."

involved. Because Dillon's argument is that Fink interfered with a contract that came into existence after February 28, 2004, and we have already determined there is insufficient evidence a contract was formed after this date, we cannot say the court erred in granting Gehrke's motion for judgment as a matter of law on this issue. *See Orme Sch.*, 166 Ariz. at 309, 802 P.2d at 1008.

Punitive Damages

¶22 Neither party appeals from the jury's verdicts on the other party's tort claims.[7] Dillon contends, however, the trial court erred in entering judgment in favor of Gehrke on his motion for judgment as a matter of law on the issue of punitive damages.[8] Dillon argues he was entitled to punitive damages on his claims for conversion, defamation, fraud, specific performance, and intentional interference with contract. In *Linthicum v. Nationwide Life Insurance Co.*, 150 Ariz. 326, 331, 723 P.2d 675, 680 (1986), our supreme court held a fact-finder must find an "evil mind" to support the imposition of punitive damages, and "[t]he key is the wrongdoer's intent to injure the plaintiff or his deliberate interference with the rights

[7]It appears that the jury's verdict in favor of Gehrke on his claim for conversion and for Dillon on his claim for defamation are inherently inconsistent—the asserted defamatory statements were Gehrke's alleged comments that Dillon had converted his property. The jury apparently found Gehrke's claim to be true by finding Dillon had converted the property. *See Read v. Phoenix Newspapers, Inc.*, 169 Ariz. 353, 355, 819 P.2d 939, 941 (1991) ("Substantial truth is an absolute defense to a defamation action in Arizona.").

[8]We note that Gehrke apparently never made a motion for judgment as a matter of law on the issue of punitive damages, and the discussion about punitive damages arose in the context of a discussion on jury instructions. However, the trial court did state that it would "not permit punitive damages to go forward in this case," which essentially granted a motion for judgment as a matter of law to both parties on the other party's claim for punitive damages.

of others, consciously disregarding the unjustifiably substantial risk of significant harm." We review de novo a trial court's grant of a directed verdict. *Little*, 186 Ariz. at 101, 919 P.2d at 1372.

¶23 We initially note that Dillon did not contend his defamation claim entitled him to punitive damages during the discussion on punitive damages in the trial court. He is therefore precluded from raising the issue here. *See Stewart v. Mutual of Omaha Ins. Co.*, 169 Ariz. 99, 108, 817 P.2d 44, 53 (App. 1991) (arguments not raised in trial court will not be considered on appeal). And, as we have previously concluded that the trial court correctly dismissed Dillon's claims for specific performance and intentional interference with contract, he is also not entitled to punitive damages on these claims.

¶24 The jury ruled in Dillon's favor on his claim for fraud, but did not award him any damages. "A plaintiff must be entitled to actual damages before being entitled to punitive damages." *Wyatt v. Wehmueller*, 167 Ariz. 281, 285, 806 P.2d 870, 874 (1991). Dillon argues the jury was instructed not to duplicate damages and, "[c]onsequently, the jury's award of damages to [Dillon] for [Gehrke's] breach of contract does, in fact, include the damages which [Dillon] suffered as a result of [Gehrke's] fraud." Dillon did not object to the way in which the jury was instructed and fails to cite any authority suggesting we may presume the jury's award for contract damages encompassed damages on a claim for fraud merely because the jury was instructed not to duplicate damages. Dillon was therefore not entitled to punitive damages on his fraud claim because the jury did not find he had sustained any actual damages. *See id.*

¶25 Finally, Dillon contends he was entitled to punitive damages on his conversion claim. Dillon argues Gehrke's failure give him notice that Gehrke intended to re-enter the Car Doctor and lock him out rather than asking about the missing equipment is evidence Gehrke acted "with spite and ill will." We disagree with Dillon that this is sufficient evidence of an evil mind for a reasonable jury to find Dillon is entitled to punitive damages. *See Orme Sch.*, 166 Ariz. at 309, 802 P.2d at 1008; *Linthicum*, 150 Ariz. at 331, 723 P.2d at 680. It is undisputed that the January 2 written contract had a closing date of February 28. Nearly two months after that date had come and gone, the transaction had not closed. There was also evidence of negotiations to extend the closing date or to create a new contract. Because the legal status of the Car Doctor business sale could at best be described as unclear when Gehrke re-entered the business in April, we cannot say that the conduct of any party attempting to assert rights in such a situation gave rise to a finding that the party acted with an evil mind.

Disposition

¶26 We reverse the judgment for Dillon on his breach of contract claim, as well as the award of attorney fees based on that claim. We affirm the trial court's grant of Gehrke's motions for judgment as a matter of law on Dillon's claims for specific performance, intentional interference with contract, and punitive damages. Both parties have requested attorney fees on appeal pursuant to the terms of the January 2 written contract. Because Gehrke is the prevailing party on appeal, we award him reasonable attorney fees upon his

compliance with Rule 21(c), Ariz. R. Civ. App. P., 17B A.R.S. And, as Gehrke requested his attorney fees in the trial court, we remand the case for a determination of these fees.

J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

PHILIP G. ESPINOSA, Judge